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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 86

AMP INCORPORATED, *Petitioner,*

v.

WILBUR J. COHEN, Secretary of Health, Education and Welfare; and JAMES L. GODDARD, Commissioner of Food and Drugs, *Respondents.*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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AMP Incorporated prays that this Court grant rehearing of its order of October 14, 1968, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the above-entitled case as prayed for in the petition filed May 10, 1968, herein.

Reasons for granting rehearing and issuing the writ

1. At the time of this Court's order of October 14, 1968, there was pending a petition for a writ of certiorari in *U.S.* v. *An Article of Drug* * * *, No. 343, this term, to review a decision of the United States Court of Appeals for the Sixth Circuit which decision is in conflict with the Second Circuit decision in the present case as set forth in the petition filed May 10, 1968, herein. This Court, on October 21, 1968, agreed to review the decision in *U.S.* v. *An Article of Drug* * * * and therefore will be deciding the same issues as presented in the present case.

2. The review by this Court of the decision in *U.S.* v. *An Article of Drug* * * * will require an examination and interpretation of the Federal Food, Drug, and Cosmetic Act and in particular a determination of the scope of the "drug" and "device" provisions of that Act. That is precisely the issue in the present case which questions the ability of the Secretary of Health, Education and Welfare to include medical devices under the "drug" provisions of the Act thereby subjecting such devices to pre-market governmental clearance procedures.

3. The decision in *AMP* v. *Gardner,* from which the instant petition and the May 10, 1968, petition are filed, is principally relied on by the United States in its petition in *U.S.* v. *An Article of Drug* * * *.

Therefore, this Court's review of the latter case will necessitate a review of the *AMP* case and the contrast between the judicial approaches taken by the Second and Sixth Circuits. Since the *AMP* case must be considered in any event by this Court, the most efficient

means of effecting such consideration is by issuing a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Conclusion

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

MARSHALL M. HOLCOMBE
Counsel for Petitioner

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

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